91-1036

No. _____

Supreme Court, U.S.
FILED
DEC 23 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

WILLIAM JONES AND JOSEPH LOVETT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES R. SHEPPARD
Attorney for Petitioners
561 Greene Street
Augusta, Georgia 30901
Georgia Bar No. 641938
(404) 724-8384

MARTIN C. PUETZ
Attorney for Petitioners
462 Telfair Street
Augusta, Georgia 30901
Georgia Bar No. 589450

JACK E. BOONE, JR.
Attorney for Petitioners
412 Greene Street
Augusta, Georgia 30901
Georgia Bar No. 067750

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In *Grady vs. Corbin*, ___ U. S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) the Court held that the Double Jeopardy Clause of the Fifth Amendment bars a subsequent prosecution, if, to establish an essential element of an offense charged in that prosecution, government will necessarily have to prove conduct that constitutes an offense for which an accused has already been prosecuted.

The question presented is whether or not the Double Jeopardy Clause bars the prosecution of the petitioners on account of an expansive, complicated drug conspiracy charge which allegedly occurred over a time interval of some ten years and which took place in several jurisdictions, when the same petitioners had already been tried and acquitted of an earlier, more particularized drug conspiracy allegation concerning conduct that clearly fell within the ambit of the greater, subsequently indicted conspiracy offense.

LIST OF PARTIES

The parties in this action in the lower court are identical with those listed in the caption.

TABLE OF CONTENTS

Page

Question Presented i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Statutes Involved 3

Statement of the Case 4

Reasons for Granting the Writ 8

Conclusion 20

Appendices

Report and Recommendation of the United States Magistrate of the United States District Court for the Southern District of Georgia, Augusta Division 1a

Order of the United States District Court for the Southern District of Georgia 19a

Opinion of the United States Court of Appeals for the Eleventh Circuit 31a

Order Denying Motion for Rehearing of the United States Court of Appeals for the Eleventh Circuit ... 32a

TABLE OF AUTHORITIES

Page

Abney v. United States, 431 U.S. 651 (1977) 2

Blumenthal v. United States, 332 U.S. 539 (1947) 8

Garrett v. United States, 471 U.S. 773 (1985) 15, 16

Grady v. Corgin, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) 2, 9, 10, 12, 14, 15, 20

Greene v. United States, 355 U.S. 184 (1957) 13

United States v. Broce, 488 U.S. 563 (1989) 11

United States v. Calderone, 917 F.2d 717 (2nd Cir. 1990) 10, 11, 13, 14, 15

United States v. Casamento, 887 F.2d 1141, (2nd Cir. 1989), *cert. denied*, 110 S.Ct. 1138 (1990) 19

United States v. Felix, 926 F.2d 1522 (10th Cir.), *cert. granted*, October 7, 1991, 60 U.S.L.W. 3217 (1991) .13, 15

United States v. Marable, 578 F.2d 151 (5th Cir. 1978) 9

No. _____

In The

Supreme Court of the United States

October Term, 1991

WILLIAM JONES AND JOSEPH LOVETT,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners William Jones and Joseph Lovett, pray (this is a double-entendre) that a writ of certiorori issue to review the judgment and opinion for the United States Court of Appeals for the Eleventh Circuit, entered in the above styled proceeding on August 13, 1991. That court denied a timely filed petition for rehearing on September 23, 1991.

OPINIONS BELOW

The Magistrate for the United States District Court for the Southern District of Georgia, Augusta Division,

issued a report and recommendation on April 30, 1990 which is reprinted as an appendix hereto, page 1a of the appendices, infra.

The United States District Court of the Southern District of Georgia rejected the magistrate's report and promulgated its own order on May 30, 1991, which is included as an appendix hereto, page 19a of the appendices, infra. The United States Court of Appeals for the Eleventh Circuit issued an unpublished, summary affirmance of the district court's May 30, 1990 order on August 13, 1991 which is reprinted as an appendix hereto, page 31a of the appendices, infra.

That appellate court denied a timely filed motion for rehearing in an order dated September 23, 1991, which is included as an appendix on page 32a of the appendices, infra.

JURISDICTION

The jurisdictional basis for appealing the trial court's decision prior to the time that these criminal charges were concluded rests upon this Court's holding in *Abney v. United States*, 431 U.S. 651 (1977) wherein it was held that a criminal accused has a right to appeal a trial court's ruling denying a motion to dismiss the charges on double jeopardy grounds if the motion is determined to be non-frivolous. In denying the petitioners' double jeopardy plea the honorable trial court judge did, in fact, make a specific finding that the motion presented a substantial question for review and therefore was not frivolous.

The petitioners thereafter prosecuted an appeal to the United States Court of Appeals for the Eleventh Circuit. A panel of that court affirmed the order of the trial court on the double jeopardy motion on August 13, 1991. It further denied the petitioners' motion for rehearing on September 23, 1991.

The jurisdiction of this Court to review the opinion and judgment of the Eleventh Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254 (1)

STATUTES INVOLVED

U.S. Constitution, Amendment Five

. . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

21 U.S.C. § 841 (a)

Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense a controlled substance. . . .

21 U.S.C § 846

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

On September 7, 1989, a federal grand jury operating under the auspices of the United States District Court for the Southern District of Georgia returned an indictment, hereafter referred to as the Georgia indictment, charging the petitioners, along with thirty (30) co-defendants and twenty-three (23) unindicted co-conspirators with various violations of the Comprehensive Drug Abuse Prevention Control Act of 1970, Title 21 U.S.C. § 801 et seq. The indictment contained seventy-seven (77) counts and was superseded twice.

The petitioner William Jones was charged in four of these seventy-seven (77) counts. For purposes of this proceeding, however, it is only important to note that he, along with the multitude of his fellow co-indictees, was indicted in the first count with the offense of conspiracy to distribute controlled substances, most importantly cocaine and cocaine base. 21 U.S.C. § 841 (a) and § 846. The petitioner Lovett was solely charged with the conspiracy count.

Shortly after the petitioners were arraigned on this indictment and entered their not guilty pleas, they filed their pre-trial motions. In addition to the usual discovery motions, they filed a motion requesting that as to them the conspiracy count be dismissed on double jeopardy grounds.

The petitioners' argument that they were again being put in jeopardy on account of a criminal offense that had already been adjudicated was centered on the fact that in 1987 both Jones and Lovett had been tried on federal drug conspiracy charges, along with six others, in the

United States District Court for the Southern District of Florida in Miami. The indictment involved therein alleged that from a date unknown until February 9, 1987 the petitioners and six other defendants conspired to possess cocaine and cocaine base within the Southern District of Florida. The matter at issue therein was a so-called "sting" operation whereby certain individuals acting as undercover government agents purported to attempt to sell several kilos of cocaine to the petitioners for further distribution. After a ten day trial both petitioners were acquitted of the drug conspiracy charge. The petitioner Lovett was convicted of attempted distribution of more than five kilograms of cocaine.

The Georgia indictment, on the other hand, charged the petitioners and a multitude of other individuals with operating a drug distribution network that stretched from south Florida to certain counties, cities and towns principally located in the area of Augusta, Georgia. In addition to cocaine and cocaine base, the indictment alleged a conspiracy to distribute marijuana and heroin. Important events and overt acts of this putative conspiracy were contended to have taken place at locales other than south Florida and the Augusta, Georgia area. Nevertheless, the salient feature of this distribution network was a cocaine distribution "pipeline" between south Florida and central and eastern Georgia.

The central figures in the operation of this drug distribution scheme, which the government contended had lasted from April, 1979 until the return of the Georgia indictment in September, 1989 were Charleston Kelley and his brother Anthony "Teny" Kelley. These two individuals were brothers and were the senior members of a

group which, at its core, was comprised of the Kelley family of Burke County, Georgia. Burke County is located some thirty miles south of Augusta. Several Kelley brothers, cousins and in-laws were also involved in the operation of this network. Most of those who were indicted as co-conspirators by the government in the Georgia indictment were not related to the Kelleys, however.

The government's theory of conspiratorial complicity notwithstanding, it should be understood that this network was not a rigid, hierarchical arrangement or structure. The central group of conspirators were Charleston and Teny Kelley, several of their older brothers such as Mike or "Mickey" Kelley, and several longtime, close associates from Burke County such as the petitioner William Jones. The petitioner Lovett could best be described as a "sidekick" of the petitioner Jones. Other than this core group of people, the other alleged conspirators had rather amorphous and undefined roles in this grouping; they were not major participants over the "long haul" of the activities alleged in the Georgia indictment.

Undoubtedly one of the principal functions that the petitioner Jones had in this arrangement was the procurement of sizeable quantities of cocaine so that the needed amount of this substance could be placed in the Florida end of the Kelley pipeline and transmitted to Georgia. To be sure, the petitioner Jones, and to a lesser extent the petitioner Lovett, operated with a large degree of autonomy in their drug procurement and distribution activities during the interval that the Kelley pipeline was in operation. They could not be characterized as "underbosses" of the Kelley network in the sense that they were always at

the command or under the direct control of either of the principal Kelley brothers, Charleston or Teny.

Nevertheless, the proposition is simply indisputable that throughout this crucial 1979 to 1989 time interval *they were always* affiliated with, associated with and engaged in constant interaction with the Kelley network. As the Kelley drug distribution conspiracy in central and eastern Georgia and in other areas grew larger and larger, it was essential that greater and greater quantities of cocaine be moved through the conduit from south Florida to Georgia. The record in this case clearly shows that William Jones and Joseph Lovett played an important role in increasing the northbound flow of cocaine through and up the Florida peninsula and into Georgia.

The continuous and ever voluminous operation of the pipeline over the years constitutes the essential context and the necessary factual backdrop to the petitioners' 1987 drug conspiracy prosecution in Florida. The circumstances which have been explicated in this segment of the petition, coupled with the facts and circumstances exhaustively discussed in the magistrate's report and recommendation which is attached as a part of the appendix to this petition, infra, clearly show beyond peradventure that the conspiratorial activities alleged against the petitioners in the Florida indictment, which supposedly occurred in Coral Gables, Florida, were part and parcel of their involvement in the distribution activities alleged in the Georgia indictment. The two seemingly distinct sets of activities are inextricably interwoven and in fact are from a jurisprudential and law enforcement viewpoint inseparable.

For reasons to be discussed, the government's decision to prosecute these petitioners in Georgia pursuant to the second indictment constitutes a clear and palpable attempt by the government to take another crack at punishing them on account of conduct for which they had previously been acquitted in the Southern District of Florida. For reasons that have been thoroughly explicated in the magistrate's report and which will be discussed hereafter, this Georgia prosecution, insofar as the conspiracy count is concerned, clearly implicates and contravenes the petitioners' double jeopardy rights.

REASONS FOR GRANTING THE WRIT

The evidence considered by the courts below clearly shows that the activities of the petitioners were a vital part of what this Court has recognized as being a "chain" conspiracy, a criminal undertaking in which there is one common design, scheme and agreement even though the participants in such an extended compact may have vastly different functions and may be personally unaware of the nature of the involvement of their compatriots in such an undertaking. *Blumenthal v. United States*, 332 U.S. 539 (1947). In a drug pipeline case such as the one at bar, there can scarcely be a more important function than procuring the contraband that is to put into the pipeline. Undoubtedly this is what the petitioners were doing when they supposedly engaged in the acts that brought about their 1987 prosecution in Florida.

Prior to the time that any of the United States Courts of Appeal had had the occasion to explicate this Court's

holding in *Grady v. Corbin, supra,* in situations such as the one at bar, the United States Court of Appeals for the Eleventh Circuit and the former United States Court of Appeals for the Fifth Circuit utilized a five part test for determining whether the facts and circumstances of a given conspiracy prosecution impermissably overlap with the facts and circumstances of a previously adjudicated conspiracy prosecution brought against an accused in order to determine whether his right not to be subjected to double jeopardy had been violated by the second prosecution. The application of these criteria in making such an analysis required a thorough examination of (a) the time frame set forth in both indictments; (b) the identity of persons alleged to be acting as co-conspirators in each indictment; (c) the statutory offenses charged in each indictment; (d) the overt acts, if any, alleged in each indictment and a careful and thorough examination of the facts and circumstances in each case tending to show the nature and scope of the alleged conspiratorial agreement; and (e) the places where the events alleged in the conspiracy allegedly took place. *United States v. Marable,* 578 F.2d 151 (5th Cir. 1978).

The magistrate in his April 30 report and recommendation with great deliberation and exactitude applied these criteria to the conspiracy charges set forth in the Florida indictment and in the Georgia indictment and concluded, for the reasons cogently set forth in his report, that these two conspiracies were one and the same for double jeopardy purposes. He therefore determined that the prosecution of the petitioners on the conspiracy count in the Georgia indictment should be barred. The petitioners refer the Court to the trenchant and persuasive

reasoning of the magistrate's report on this issue and therefore they will not extensively recite the magistrate's argument and reasoning concerning the application of the *Marable* criteria in this portion of the petition.

At the time that the magistrate and the United States district court wrestled with this issue, they did not have the benefit of the manner in which the various United States appellate courts had applied *Grady v. Corbin, supra* to successive conspiracy prosecutions. Specifically, they did not have the benefit of the illumination that the United States Court of Appeals for the Second Circuit had thrown upon this issue in its decision in *United States v. Calderone*, 917 F.2d 717 (2nd Cir. 1990).

In *United States v. Calderone, supra*, the Second Circuit specifically held that the *Grady v. Corbin* test for determining whether a subsequent prosecution constitutes double jeopardy is not limited to single act or transaction offenses which are relatively limited in time and space. Rather that court held that this Court did not evince any intention to limit its mode of double jeopardy analysis in such a manner, and that the *Grady v. Corbin* test should be applied to conspiracy cases and other multi-tiered crimes which can extend over considerable time and space, and which can involve many transactions.

> Although *Grady* involved the successive prosecution of separate crimes arising from a single event, nothing in the opinion suggests that the court intended to limit the "same conduct" test to those particular circumstances. Instead, the court's concern with the dangers of multiple trials, and its belief that its *Blockburger*

> test by itself was insufficient to guard against these dangers, see 110 S.Ct. at 2090-93, suggests that the *Grady* test was intended to guide double jeopardy analysis in all cases involving successive prosecutions. The "same conduct" test is described in inclusive, generally applicable terms throughout the opinion, see, e.g., id. 110 S.Ct. at 2093 "The Double Jeopardy Clause bars *any* subsequent prosecution" if the *Grady* test is met (emphasis added). Indeed the opinion is structured so that it first declares a general rule, id. 110 S.Ct. at 2090-93, and then applies that rule to the facts of the case. See id. 110 S.Ct. at 2094.
>
> For these reasons, we are persuaded that the "same conduct" test announced in *Grady* applies to all double jeopardy claims arising in the context of successive prosecutions.

United States v. Calderone, supra at 721.

Very importantly, the Second Circuit went on to note, citing to this Court's opinion in *United States v. Broce*, 488 U.S. 563 (1989) that "In conspiracy cases, the agreement is all but synonymous with the offense itself." id. Thus the *Calderone* court correctly highlighted the fact that concerning the conspiracy offense, *it is the conspiratorial agreement which is the subject of prosecution and punishment, not the conduct from which such an agreement can be implied or inferred*. For this reason a successive conspiracy prosecution which purports to punish the defendants for the same agreement of which they had previously been acquitted in an earlier prosecution must be prohibited by basic principles of double jeopardy jurisprudence, even

though the government is relying upon different evidence to prove the agreement in the later proceedings.

In both cases the agreement is the "conduct" which the government is attempting to prosecute and punish in each proceeding. In a situation such as the one at bar where the alleged earlier transaction is but an integral and necessary part of the overall scheme, the agreement which is the conduct of the narrower transaction must also be deemed to be the agreement or "conduct" of the greater and more extended conspiracy transaction. These purportedly separate incidents and transactions are therefore the same conduct and therefore the same offense for double jeopardy purposes.

> The critical inquiry is what conduct the state will prove, not the evidence that the state will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever preclude the government from introducing that same evidence in a subsequent proceeding.(cit) *On the other hand, a state cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct.* (petitioners' emphasis)

Grady v. Corbin, supra 110 S.Ct. at 2093.

In seeking to closely and faithfully adhere to this Court's holding in *Grady v. Corbin, supra,* the Second Circuit specifically held that its precepts are fully applicable to successive conspiracy prosecutions in terms that are directly applicable to the case under consideration:

> A double jeopardy test that depends entirely on the agreement charged in the indictment would

> permit a series of conspiracy prosecutions based on identical conduct, provided that the succeeding indictments alleged smaller or larger, or different "agreements" than the ones previously charged. Not only would this subject the defendants to the "embarrassment, expense or ordeal" of trials seriatim, *Greene v. United States*, 355 U.S. 184, 187-188, 78 S. Ct. 221, 223-224, 2 L.Ed. 2d 199 (1957), it would also give the government "an opportunity to rehearse its presentation of proof, thus increasing the risks of an erroneous conviction." *Grady*, 110 S. Ct. at 2091-92

United States v. Calderone, supra, at 722.

As the petitioners have noted, the government's own documentary evidence clearly shows them to have been important players and participants in the Kelley drug pipeline network throughout the greater part of its existence, certainly in 1987 when the Florida prosecution arose. The Coral Gables incident was surely an aspect of their important function in procuring cocaine to put into the Florida end of the pipeline. For this reason, a judicial finding that they did not engage in a conspiracy to procure for the pipeline in that instance must necessarily bar further judicial inquiry as to whether they were a part of the larger conspiracy embodied in the Florida to Georgia network.

The petitioners' contention in this regard is further buttressed by the more recent holding of the United States Court of Appeals for the Tenth Circuit in *United States v. Felix*, 926 F.2d 1522 (10th Cir.), cert. granted, October 7, 1991, 60 U.S.L.W. 3217 (1991). In that case the defendant was initially convicted of a single count of

attempting to manufacture methamphetamine in the United States District Court for the Western District of Missouri. Shortly after this proceeding was concluded, federal prosecutors indicted him and tried him on a multi-count indictment in the United States District Court for the Eastern District of Oklahoma with the offenses of conspiracy to manufacture methamphetamine, possession with the intent to distribute methamphetamine and other related offenses. The course of criminal conduct that was the subject of both prosecutions was identical; there was little discernable difference in the facts and circumstances relied upon by the government to obtain convictions in either of these cases. Absolutely no significant circumstances differentiated one case from the other in terms of the operative facts pertaining to each of them.

The United States Court of Appeals for the Tenth Circuit carefully examined the facts of each case in determining whether or not the second prosecution had violated the defendant's right to be free from double jeopardy. In making its analysis, the court relied heavily on this Court's decision in *Grady v. Corbin, supra* and the Second Circuit's decision in *United States v. Calderone, supra*. That court determined that the second prosecution had indeed traduced Felix' Fifth Amendment rights relating to double jeopardy, and in so ruling, it made the following observation which is directly relevant to the scenario presented herein:

> As shown below, the fact that Felix' two trials constitute successive prosecutions arising from virtually the same conduct involving the

> same actors and overlapping time frames signals the need to apply the *Grady* double jeopardy analysis. A court should carefully apply double jeopardy analysis where a defendant's constitutional rights are threatened by prosecutors who have the opportunity to draft indictments in which they can allege *apparently* separate criminal conduct.

United States v. Felix, supra at 1528.

Clearly this Court's decision in *Grady v. Corbin, supra* considered in conjunction with the rulings of the Second Circuit in *United States v. Calderone, supra* and the Tenth Circuit in *United States v. Felix, supra,* show that the Eleventh Circuit's decision affirming the trial court's denial of the petitioners' double jeopardy motion is at fundamental variance with this Court on this issue as well as the two decisions of these other federal appellate courts.

In arguing against the petitioners' double jeopardy contentions in the Eleventh Circuit, the government relied very heavily upon this Court's decision in *Garrett v. United States,* 471 U.S. 773 (1985). The government's position notwithstanding, a careful examination of *Garrett* reveals it to be wholly inapplicable to the double jeopardy issue presented sub judice. The *Garrett* case dealt with the issue of whether or not a criminal accused could be prosecuted for a continuing criminal enterprise offense, in a manner consistent with the Double Jeopardy Clause, when he had already been convicted of a federal criminal offense in another district which was urged by the prosecutors in the subsequent CCE prosecution as an integral component of that offense. This Court ruled that the CCE prosecution did not violate that defendant's double jeopardy rights even though it was substantially

based upon an incident for which the defendant had already been prosecuted and convicted.

In making its ruling however, the Court placed great stress upon the fact that the continuing criminal enterprise offense was a completely new crime created by Congress, in circumstances where the evident intent of the Congress was to create this new offense in a manner wholly separate, apart and distinct from the earlier crime for which the defendant had been convicted. "The language, structure and legislative history of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, however, show in the plainest way that Congress intended the CCE provision to be a separate criminal offense which was punishable in addition to, and not as a substitute for, the predicate offenses." *Garrett v. United States, supra,* at 779.

In contrast to the situation in *Garrett*, the government by means of the Georgia indictment is attempting to prosecute the petitioners for the very same offense of which they were acquitted in the 1987 Florida proceedings, conspiracy to possess with intent to distribute controlled substances. Thus, the government is foreclosed from arguing that this later prosecution has been specifically authorized by the creation of a separate and distinct federal criminal offense, albeit one that contains elements of the earlier prosecution, by authorization of an express act of Congress. The only conclusion that can be logically arrived at in this case is that the Georgia indictment constitutes a palpable attempt by the government to prosecute these petitioners for criminal conduct of which they had previously been acquitted in an earlier proceeding. A more flagrant violation of the Fifth

Amendment Double Jeopardy Clause can scarcely be imagined.

Because of the conflict that the Eleventh Circuit's decision in this case has created between it and the previously described decisions on the same issue rendered by the Second Circuit and the Tenth Circuit, this Court should grant a writ of certiorari and review this case in order to resolve these serious differences concerning the parameters of an important constitutional provision that guarantees such a fundamental right to all Americans, the right to be free from successive prosecutions for the same offense once a decision has been reached concerning the matter in the initial trial proceeding. More importantly, the Court should use this case as a vehicle for rigorously delineating the circumstances under which federal prosecutors can charge a conspiracy offense whenever two or more defendants are indicted for some federal drug crime.

In the Southern District of Georgia, it has virtually become a monotonous routine for federal prosecutors to charge defendants in multi-party drug offenses with conspiracy in almost all cases of this nature. As the United States Magistrate said in his report in this case, "It is my observation that virtually every drug indictment drawn in this district in recent years contains a conspiracy count. It would appear that the government has some obsession that without such a count the indictment is incomplete." Appendices at 5a.

It is no secret that prosecutors frequently utilize the conspiracy allegation in order to dilute, if not eviscerate, many of the fundamental constitutional rights that an

accused would have if he were to be tried alone, such as his right to confront the witnesses who give testimony against him, for example. Moreover, broad based and all encompassing conspiracy allegations allow prosecutors to "throw together" a large number of frequently disparate defendants for trial in one proceeding, many of whom may have the most tenuous of associations with each other and with the alleged criminal scheme. In such a manner, a criminal accused's right to an individualized determination of his guilt or innocence can be severely undermined and in such circumstances the possibility, if not the probability, that he will be convicted on the basis of "guilt by association" is ever present in the process of adjudicating his culpability.

In a case such as the one under consideration, an entirely appropriate invocation of an accused's right not to be placed in double jeopardy will most assuredly serve the cause of basic fairness and justice by precluding the government by putting these petitioners through the ordeal of another trial when the government has already failed on one occasion to obtain convictions against them in connection with their alleged involvement with the same conspiratorial compact or design. An opinion from this Court in a case of this nature would surely assist federal prosecutors and federal judges in determining the proper circumference of the conspiracy allegation in a legal and judicial-milieu where conspiracy indictments are multiplying geometrically with every passing year.

Furthermore, by accepting review of this case and by setting perimeters on conspiracy indictments, the Court would be assisting the federal trial courts in disposing of

these multi-party drug cases in an orderly and expeditious manner. The kind of "mass trial" contemplated by the Georgia indictment is inherently unwieldy and difficult for the trial judge and other court officials to administer. The United States Court of Appeals for the Second Circuit has expressly recognized this fact and has condemned the use of such trial proceedings unless they are clearly warranted in view of all of the circumstances surrounding a given case. *United States v. Casamento*, 887 F. 2nd 1141, 1151-1153 (2nd Cir. 1989), cert. denied, 110 S.Ct. 1138 (1990) By fully affording criminal defendants in the position of the petitioners their full and complete rights under the Fifth Amendment Double Jeopardy Clause, which are due to them in any event, this Court would implicitly encourage federal prosecutors to break these cases down into manageable units and to indict such criminal defendants in the first instance only for those crimes that can be proven at trial with a reasonable utilization of prosecutorial resources, within a reasonable length of time and which are readily understandable by the average juror.

In summary, this Court should grant certiorari in order to fully illuminate and explicate the complicated issue of how the Double Jeopardy Clause governs the prosecution and disposition of successive criminal conspiracy cases of this nature. Most importantly, it should do so in order to protect these petitioners' important rights under the Double Jeopardy Clause. However, another important reason why review should be granted is that by means of this decision the Court may protect

the orderly administration and disposition of cases of this kind within the federal criminal justice system itself.

CONCLUSION

The double jeopardy clause bars the government from prosecuting the petitioners concerning the conspiracy charge for which they are presently under indictment because they had already been prosecuted and acquitted in the United States District for the Southern District of Florida for conduct, a conspiratorial agreement, which is an integral and important part of the conspiracy charge with which they are presently charged in the United States District Court for the Southern District of Georgia.

The petitioners have clearly shown that the alleged criminal conduct which was the subject of the 1987 Florida prosecution was part and parcel of the conspiratorial agreement and design alleged in the 1989 Georgia indictment. For this reason, the Court's decision in *Grady v. Corbin, supra,* as further explicated by the decisions of the United States Courts of Appeal for the Second Circuit and the Tenth Circuit, clearly bars the prosecution of Mr. Jones and Mr. Lovett on the conspiracy count involved in the Georgia proceeding.

Because it is necessary for this Court to further examine and explicate the law on this subject and since the petitioners' fundamental constitutional right not to be subjected to successive prosecutions is clearly implicated and violated by this new conspiracy charge, this Court should grant the petitioners' request for the issuance of a writ of certiorari to the United States Court of Appeals

for the Eleventh Circuit, reverse its decision in this case in accordance with the principles set forth above, and remand the case back to the lower federal courts for further proceedings consistent with such a disposition.

This 23rd day of December, 1991.

CHARLES R. SHEPPARD
Attorney for Petitioners
561 Greene Street
Augusta, Georgia 30901
Georgia Bar No. 641938

MARTIN C. PUETZ
Attorney for Petitioners
462 Telfair Street
Augusta, Georgia 30901
Georgia Bar No. 589450

JACK E. BOONE, JR.
Attorney for Petitioners
412 Greene Street
Augusta, Georgia 30901
Georgia Bar No. 067750

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

UNITED STATES OF AMERICA	)	
	)	CR-189-13
v.	)	(Filed
WILLIAM JONES, et al.,	)	Apr. 30, 1990)
Defendants.	)	

MAGISTRATE'S REPORT AND RECOMMENDATION

Defendant, William Jones, through his attorney moved on November 30, 1989 to dismiss Count One of the indictment, alleging that he had previously been charged and acquitted by a jury on the same charge in a United States District Court for the Southern District of Florida in 1987. Co-defendant, Joseph Lovett, moved to adopt William Jones' motion to dismiss Count One. In Count One of this indictment, defendants Jones and Lovett are charged as co-conspirators under 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 with knowingly and intentionally possessing with intent to distribute, and to distribute, cocaine hydrochloride (HCL), and cocaine base, commonly known as Crack, Schedule II narcotic controlled substances, marijuana, a Schedule I narcotic controlled substance, and heroin, a Schedule I narcotic controlled substance. The date of the onset of this conspiracy is listed as beginning on or about the third day of April, 1979, and continuing thereafter until the return of the indictment. The charge in Count One of this case

alleges that the activity occurred in Richmond, Columbia, Burke, Jenkins, and Toombs within the Southern District of Georgia and elsewhere, including elsewhere in Georgia and the states of Florida, South Carolina, North Carolina and Tennessee. The indictment also alleges that defendants Jones and Lovett participated in this conspiracy with 30 other named co-defendants, including 22 unindicted co-conspirators, as well as with other persons both known and unknown to the grand jury.

Defendants William Jones and Joseph Lovett, along with Lazario Lopez, Pedro Garcia, Jamie Cruz and Samuel Farmer were indicted in 1987 in the United States District Court for the Southern District of Florida in a two-count indictment, Count One alleging a conspiracy to possess with intent to distribute more than five kilograms of cocaine hydrochloride and attempted possession with intent to distribute more than five kilograms of cocaine hydrochloride. 21 U.S.C. §§ 841(a), 846. See Criminal Action 87-92-CR SMA. Defendants were tried before the Honorable Sidney M. Aronovitz, United States District Judge at Miami, Florida, in a trial commencing on May 18, 1987 and concluding on May 29, 1987. Defendant William Jones was found not guilty as to both Counts One and Two, while defendant Joseph Lovett was found not guilty as to Count One, but guilty as to Count Two of the indictment. *See* Volume Ten, Transcript of Proceedings in the matter of *United States of America v. Larazio Lopez, et al.* at p. 925. *See also* judgment of acquittal submitted by defendant Lovett in defendants' exhibit two.

Defendants Jones and Lovett contend that their present prosecution in Count One of this indictment is precluded as the result of their both being found not guilty

of the conspiracy charge in the Florida matter in 1987 under the double jeopardy prohibition of the Fifth Amendment. Defendants allege that the Florida indictment is a part of this conspiracy, that the time frame in both this and the Florida indictment overlap; that there is a significant identity of personnel in both indictments in Count One; the statutory offenses charged in both this prosecution and the Florida indictment are the same; that the acts to be punished, namely the possession with intent to distribute multiple kilos of cocaine, are present in both indictments; and, that the geographical area encompassing the conspiracy overlap and are included in both indictments. The government's argument is to the contrary. The government states that defendants' actions in Coral Gables, Florida in 1987 were an isolated, unconnected instance in which defendants Jones and Lovett were attempting on their own to secure a new source of cocaine utilizing a different set of co-conspirators. The government further alleges that the Georgia indictment, unlike the Florida indictment, charges defendants in a conspiracy for not only the possession with intent to distribute cocaine, but marijuana and heroin as well, and that the 302's prepared by the Federal Bureau of Investigation show that Anthony Kelly was the sole source of cocaine for defendants Jones and Lovett after their Florida arrest in February, 1987. Additionally, the government responds that the 302's of co-defendants Eric Robinson and Wesley Kelley show that Jones and Lovett regularly received their cocaine from Anthony Kelly, and that Jones and Lovett were the supply line from Anthony Kelly in Florida to the other co-conspirators in the Southern District of Georgia. The issue at hand is whether there was

one or more agreements involving defendants Jones and Lovett and the Georgia and Florida indictments.

The Fifth Amendment in part provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause protects against prosecution for an offense after a conviction or acquittal for the same offense. *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980); *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). It is the purpose of the double jeopardy clause to prevent multiple prosecutions and punishments for the same offense, since "successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues resolved by the first." *Brown v. Ohio*, 432 U.S. 161, 165, 166 n.6, 97 S.Ct. 2221, 2226 n.6, 53 L.Ed.2d 187 (1977). The burden is upon the defendant to make a *prima facie*, non-frivolous showing that the Fifth Amendment violation against double punishments has been presented. The burden then shifts to the government to show otherwise. *United States v. Benefield*, 874 F.2d 1503, 1505 (11th Cir. 1989); *United States v. Stricklin*, 591 F.2d 1112, 1117-1118 (5th Cir. 1979).

In *United States v. Marable*, 578 F.2d 151 (5th Cir. 1978), the Court found the existence of only one conspiracy regarding the possession of cocaine with intent to distribute. In *Marable*, the Court noted that in a conspiracy prosecution under 21 U.S.C. § 846, for conspiracy overt acts are not required as they are under the general conspiracy charge contained in 18 U.S.C. § 371. "A Section 846 conspiracy is sufficient if it alleges a conspiracy to distribute drugs, the time during which the conspiracy

was operative and the statute allegedly violated. . . . " *Id.* at 154. In determining whether there was only one or multiple conspiracies, the Court in *Marable* looked at five factors: the time frame in both indictments; the identity of persons acting as coconspirators; the statutory offenses charged in each indictment; the overt acts charged to show the nature and scope of the conspiracy; and lastly, the places where the event alleged in the conspiracy took place. The Supreme Court, in *Brown v. Ohio, supra,* 432 U.S. 161 at 169, 97 S.Ct. at 2227 noted: "the Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spacial units." It should be noted that conspiracy counts are susceptible to abuse by fervent prosecutors and that such abuses must be guarded against. *See, e.g., United States v. Ruggiero,* 754 F.2d 927, 934 (11th Cir. 1985). The double jeopardy clause precludes the government from dividing up a single conspiracy into multiple charges and pursuing successive prosecutions against the defendant in more than one jurisdiction. However, that is not to say that a defendant may be involved in more than one conspiracy during the same period of time. *United States v. Benefield* at 1508. As commented upon in *United States v. Stricklin,* 591 F.2d 1112 (5th Cir. 1979), the need for care, and the definition of the drawing of indictments in conspiracy cases, is paramount, particularly in drug conspiracy cases. It is my observation that virtually every drug indictment drawn in this district in recent years contains a conspiracy count. It would appear that the government has some obsession that without such a count the indictment is incomplete. The conflict in this case arises

because of defendants Jones' and Lovett's assertion that the Florida indictment was sufficiently broad enough to encompass all of their conduct while the government on the other hand asserts a narrower interpretation.

> The relevant question [in narcotic conspiracy cases] is . . . whether the particular transactions alleged in the indictments were within a larger, unified conspiracy.

United States v. Ruigomez, 576 F.2d 1149, 1151 (5th Cir. 1978).

In examining a double jeopardy claim, the Court must be careful in using the "same offense" test which focuses on the similarity or dissimilarity of the evidence adduced in multiple prosecutions, for such a test permits the government to arbitrarily split unitary narcotics conspiracies and to instigate many prosecutions. *Id.* at 1151. The Court in *Ruigomez* stated that: "Conspiracies to traffic in drugs are ordinarily of the continuing sort: once the parties have agreed to the criminal enterprise, the day-to-day operations of buying, transporting and selling are handled without the necessity of renewing the underlying consensual agreement." *Id.* In *Illinois v. Vitale, supra,* the Court recognized that *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) sets forth the principal test for determining double jeopardy. 447 U.S. at 416, 100 S.Ct. at 2265.

I have examined a number of cases in this Circuit concerning the issue of double jeopardy as the result of a prior offense either resulting in an acquittal or a conviction. In *United States v. Marable, supra,* the Court found there was only one conspiracy concerning the possession

with intent to distribute cocaine. In that instance, the Court found that in the first and second trials essentially the same cast of characters or witnesses were employed. Both indictments charged violations of the same statute and the dates were either overlapping or close in time. Lastly, the places and events alleged in the conspiracy were overlapping. In *United States v. Benefield, supra,* the Court did not reach the ultimate issue as to whether double jeopardy existed. The matter was remanded for an evidentiary hearing after the Court found that the defendant had made a *prima facie* showing of a non-frivolous claim of double jeopardy. However, the Court noted similar characteristics between the first indictment which charged the defendant with conspiracy to possess and with intent to distribute marijuana, and the second indictment which charged conspiracy with intent to possess marijuana and cocaine. The dates of both instances were overlapping; they both encompassed the Northern District of Georgia and elsewhere; there was a similar identity and overlapping of co-conspirators. In *United States v. Stricklin, supra,* jeopardy was found to have attached in a Florida indictment after the Court examined a Texas, a New Mexico and a Tennessee indictment involving the defendant. In *United States v. Ruigomez, supra,* the Court found considerable evidence that there was a single continuing conspiracy to possess and distribute marijuana, and hence double jeopardy attached to the second indictment.

A hearing on the motion to dismiss was held on January 8, 1990. The Court, while not receiving any live testimony, heard argument from both the defendants and

the government, and received certain documentary matters into evidence. Following the hearing, the Court was also provided with a copy of the transcript of the proceedings in the United States District Court for the Southern District of Florida which resulted in the acquittal as to defendant Jones of both charges and defendant Lovett as to one charge. *See United States v. Benefield, supra* at 1506.

In a conspiracy there is no requirement that each member of the conspiracy conspire directly with every other member of the conspiracy. Neither is it necessary that the same people were involved throughout the entire period of the conspiracy in order to find one conspiracy. *See United States v. Friedman*, 854 F.2d 535, 562 (2nd Cir. 1988). Co-conspirators must, though, during the course of the conspiracy contribute to the furtherance of the conspiracy. *United States v. Rodriguez-Arevalo*, 734 F.2d 612 (11th Cir. 1984). The conspiracy may include the performance of many transactions, during which new parties may join, or old parties terminate their relationship with the conspiracy at any time. *United States v. Garcia*, 785 F.2d 214, 225 (8th Cir. 1986). The government need not prove that the defendant knew all the co-conspirators or was aware of all of the details of the conspiracy. *United States v. Brown*, 872 F.2d 385, 390 (11th Cir. 1989); *United States v. Paine*, 750 F.2d 844 (11th Cir. 1985). *See United States v. Darby*, 744 F.2d 1508, 1542 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100, 105 S.Ct. 2322, 85 L.Ed.2d 841 (1985). A single conspiracy does not become a multiple conspiracy because a particular member does not know the identity of other members of the conspiracy. *United States v. Orr*, 825 F.2d 1537, 1543 (11th Cir. 1987). Neither must the government prove knowledge of participation

of others, though the government must prove that the defendants knew the general nature and scope of the conspiracy. *United States v. Clarke*, 732 F.2d 1536 (11th Cir. 1984). A defendant may be found guilty of conspiracy even if he did not join it until after its inception, and even if he played only a minor role in the total scheme. *Id.* It is still one conspiracy even though the objectives are carried out on different occasions and locations when the objective is to fulfill the illegal agreement. *United States v. Goff*, 847 F.2d 149, 166 (5th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 324, 102 L.Ed.2d 341 (1988).

The sole issue to be decided is whether we have one or multiple conspiracies between the indictment in this Court and the previous indictment on which defendant Jones was acquitted of all charges, and defendant Lovett on only the conspiracy charge in the 1987 Florida indictment. In order to determine whether the prosecution in this matter is barred as having been included in the earlier prosecution, I will examine the factors of time, parties, offenses, overt acts and places as set forth in *United States v. Marable, supra.*

A. TIME FRAME

The Florida indictment 87-0092 CR-ARONOVITZ alleges from a date unknown until February 9, 1987 at Miami, Dade County in the Southern District of Florida, the conspiracy took place. *Sub judice* this indictment lists a beginning date of April 3, 1979 through the return of the indictment which occurred on September 2, 1990.

Timewise, the period covered in both indictments overlaps. In an FBI 302 which defendants submitted to supplement their motion to dismiss, it is revealed that Jones and Lovett were supplying large quantities of cocaine as early as 1986. The government, on the contrary, alleges that the Lopez case involved events only on or about February 9 and 10, 1987. However, the indictment in Lopez clearly states otherwise, so as to include a time frame earlier than February 9, 1987. The government in another FBI 302 prepared between February 15 and 17, 1990 from co-conspirator Anthony "Teny" Kelly reveals that Kelly began to supply Jones and Lovett cocaine following their arrest in Coral Gables, Florida in February, 1987. The government contends that this shows that defendants Jones and Lovett did not become a part of the conspiracy until after their arrest in Florida in February, 1987 in the Lopez matter. The government further states that the FBI 302's from Eric Robinson and Wesley Kelley reveal that after the 1987 arrest, Jones and Lovett regularly commuted to Florida to receive from co-conspirator Anthony Kelly large quantities of cocaine, and hence became the conduit between Anthony Kelly and Charleston Kelley in the Augusta, Georgia area. The government further alleges that since only seven of the 78 overt acts in the Kelley indictment occurred prior to 1987 that the Court should take this into consideration. Overt acts are not required to be established in an indictment under 21 U.S.C. § 846. *United States v. Marable, supra.* The fact that the indictment lists only seven of the 78 overt acts as having occurred prior to 1987 is not dispositive, but rather shows that the government's investigation began in earnest in 1987 and thereafter.

B. PERSONS ACTING AS CO-CONSPIRATORS

Contrary to the governments assertion, there is a significant overlapping of co-conspirators. On page 13 of the government's affidavit in support of its application for a wire intercept on October 5, 1988 under 18 U.S.C. § 2510, *et seq.*, it is stated in paragraph 27, at page 13 therein: "Anthony Kelly reportedly obtains the cocaine from unknown Cubans in the South Florida area." In the Lopez or Florida indictment, the DEA 6's show that Pedro Luis Garcia is a Cuban-born male as is co-conspirator Jamie Cruz and Lazario Lopez. Both the Lopez indictment and this indictment refer to the fact that there are other co-conspirators who are unknown, which would incorporate a "Cuban connection" inclusive of Lazario Lopez, Jamie Cruz and Pedro Garcia, who are named as defendants along with Jones and Lovett in the Florida indictment. In this indictment, the grand jury also refers to the fact that in addition to the named conspirators and the named unindicted co-conspirators, there are also other unknown co-conspirators, again a phrase sufficiently broad enough to include these defendants in the Lazario-Lopez indictment. The fact that co-conspirators Eric Robinson and Wesley Kelley later state in their FBI 302's that Jones and Lovett were the conduit for Anthony Kelly to ship cocaine from Florida to the southern district of Georgia does not mean that Lazario Lopez, Pedro Garcia, Jamie Cruz and Samuel Farmer were not part of this conspiracy. It is not required that all co-conspirators know the identity of all coconspirators. Further, after their arrest in 1987, and later conviction, Lopez, Garcia and Cruz were incarcerated. What is required as noted earlier is that each co-conspirator must contribute to the

furtherance of the conspiracy. Furthermore, it is not necessary that the same people be involved throughout the entire period of the conspiracy for the Court to find the existence of one conspiracy. A conspiracy may include the performance of many transactions and new parties may join or old parties terminate their relationship with the conspiracy at any time. Lopez, Garcia and Cruz were terminated by virtue of their being incarcerated. Furthermore, the DEA 6's dated February 17, 1987 contain the statement that the targets in the Lopez matter "will be Lazario Lopez and various other cocaine/marijuana traffickers associated with Lopez not yet identified." The government in seeking to distinguish the two indictments says that where there are four individuals in the Lopez and some 30 in the present case, that the mere fact that both bills of indictment allege unknown conspirators does not affect the Court's determination. The fact that there may have been more named co-defendants and co-conspirators in one indictment as opposed to another is not dispositive. In *United States v. Stricklin, supra,* the Tennessee charge listed the defendant and 39 co-defendants, while the New Mexico indictment named the defendant and five coconspirators. The Texas indictment named the defendant and thirteen co-defendants, while the Florida indictment named the defendant and five co-defendants. The fact that there may have been more co-defendants in one prosecution than in another indictment does not establish the existence of multiple conspiracies.

C. STATUTORY OFFENSES CHARGED IN BOTH INDICTMENTS

Count One of this indictment and count one of the Florida indictment are identical. Both allege violations of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846.

D. OVERT ACTS CHARGED

As earlier noted, in an indictment alleging a conspiracy under 21 U.S.C. § 846, proof of overt acts are not required. *United States v. Marable, supra* at 154. No overt acts are alleged in the Florida indictment. In this indictment, 78 overt acts are alleged in which defendant Jones is named in overt acts 24, 25, 51, 61, 62 and 78. Each of those instances occurred not earlier than January, 1988. Defendant Lovett is named in overt acts 51 and 78, and the dates of those overt acts do not begin earlier than January 9, 1989. The Florida indictment charges that the conspiracy with intent to possess and distribute involved more than five kilograms of cocaine hydrochloride took place in February, 1987. The indictment in this case is not dissimilar in that it too alleges in paragraph 7 of the ways, manner and means in which the conspiracy was carried out, that William Jones and Joe Lovett, along with others, "would acquire and cause to be transported, large quantities of cocaine hydrochloride, cocaine base, heroin and marijuana from locations of South Florida and elsewhere for distribution in the southern district of Georgia and elsewhere. The Lopez indictment does not rule out the fact that the conspiracy to conspire, confederate, etc. to knowingly and intentionally possess with intent to

distribute cocaine, from leaving the southern district of Florida.

The government argues that this was a single, isolated incident of an attempt to purchase a quantity of cocaine in Dade County, Florida by Jones and Lovett. Of course, unknown to the Lopez defendants including Jones and Lovett, the suppliers were undercover law enforcement officers. Moreover, the DEA 6's in the Lopez matter show on February 9, 1987, that in addition to cocaine, the purchasers were also interested in marijuana. I cannot agree with the government's position that because the Kelly indictment involves numerous shipments of drugs from South Florida to Georgia that the quantity of cocaine in the Lopez indictment should be discounted. By no means can the Court consider that the six kilograms of cocaine Jones and Lovett sought to purchase constitutes a small quantity of a narcotic substance. The DEA 6's in the Lopez matter clearly indicate that the purchasers of the six kilograms were to be defendants Jones and Lovett. This is consistent with the FBI 302's that reveal that Jones and Lovett were the south Florida conduit into the southern district of Georgia for cocaine. While Jones and Lovett may not have directly dealt with Anthony Kelly until after their arrest in February, 1987 that fact is not indicative of there being two separate conspiracies. Rather, this is consistent with the FBI 302's of Mickey Kelley in which he claims that Jones and Lovett have been supplying significant quantities of cocaine to the Augusta, Georgia area as early as 1986, and that some of it was being sold to the Kelleys. Of interest is Mickey Kelley's statement that in 1987, Jones and Mickey Kelley sold a kilogram of cocaine to a Clarence Brown which

resulted in the kilogram being short some nine ounces. There is, thus, evidence that Jones and Lovett were dealing in cocaine in the Augusta, Georgia area prior to 1987. The arrest of Jones and Lovett in February, 1987 does not mean that they were not a part of the Kelly organization. It definitely appears that defendants Jones and Lovett were a part of the Kelley organization. In February, 1987, Jones and Lovett were dealing with a group of Cuban males to purchase six kilograms of cocaine. That same pattern exists in this indictment.

The government's claim that after February, 1987, Anthony Kelly was the sole supplier of cocaine for the Kelly conspirators is directly refuted by an FBI report of July 14, 1989, in which Special Agent Harold Harrison recounts that informant Anthony Lindsay observed Cassius Kelley on July 10, 1989 cooking crack cocaine for Joe Jones, cocaine Jones had purchased from an R. C. Allen in Waynesboro, Georgia.

It is clear from the DEA 6's contained in defendants' exhibit number two that the purchasers of the cocaine in February, 1987 in Florida were defendants Jones and Lovett. The information reveals that Jones and Lovett were operating a red Toyota pickup truck with Georgia tags.[1] In fact, the $101,000 in United States currency which was to be used to purchase the six kilograms of cocaine was removed from a panel on the red pickup

---

[1] On January 8, 1989, Jones and Lovett were stopped on Interstate 95, outside of Boynton Beach, Florida by the Florida State Highway Patrol. They were riding in a red Toyota pickup truck with Georgia tag number XP 6433. This is the same truck they used on February 10, 1987.

truck. The pickup truck in question was being driven by defendants Jones and Lovett. From the evidence it appears that the cocaine Jones and Lovett expected to purchase was intended for the Southern District of Georgia, as opposed to the Southern District of Florida. The Coral Gables incident was simply a small portion of the broadly charged Georgia conspiracy. The government has presented no evidence to show that the six kilograms were intended for a different distributee or purchaser, or to be distributed in a different location.

There is a further similarity in the purchase of the cocaine in Florida by Jones and Lovett, when comparing the Florida and Georgia indictments in that the method of transportation was through motor vehicles. In some instances the Georgia indictment alleges that drugs were transported in tires and wheels of automobiles. There is further evidence that hidden compartments in automobiles were also used. In the Florida case, it appears that a hidden panel on the red pickup was used to conceal the currency which was intended for the purchase of cocaine, and therefore it can be further assumed that this same panel would later be used to conceal the cocaine which Jones and Lovett hoped to purchase, but were thwarted when their seller turned out to be an undercover law enforcement officer. As stated in *United States v. Nichols*, 741 F.2d 767 at 772, a mere shuffling of personnel in an otherwise on-going operation with an apparent continuity will not, alone, suffice to create multiple conspiracies.

E. GEOGRAPHY

While the geography in the Florida or Lopez indictment encompasses the Southern District of Florida, the Georgia indictment likewise includes the Southern District of Florida, the Southern District of Georgia and portions of North Carolina and South Carolina. There is a clear overlapping of geography. Moreover, in both the Georgia and Florida indictments, the purchasing of cocaine took place within the Southern District of Florida. In both indictments it appears that the suppliers were unknown Cuban males. In the Florida case it appears that the Cuban males indicted along with Jones and Lovett were the brokers for what was intended to be a purchase of six kilograms of cocaine. In both indictments, the government alleges the Southern District of Florida as the originating area for bulk cocaine purchases.

In evaluating the facts contained in this record, and when applying the *Marable* standards, I am compelled to conclude that the participation by Jones and Lovett in Florida in 1987 was a part of a single conspiracy to commit multiple violations of the federal drug control laws. "The conspiracy had a continuity of personnel, a consistency in method, an identical base of operation, and a singleness of unwavering purpose." *United States v. Nichols, supra* at 772. All of these factors point to the conclusion that there was one single conspiracy. There was a regular pattern of activity, a strong continuity of membership and a common goal. *See United States v. Grassi*, 616 F.2d 1295, 1303 (5th Cir. 1980). Accordingly, I find and recommend that the motions of defendants William Jones and Joseph Lovett that Count One of the indictment be dismissed because of the prohibition of

being placed in double jeopardy as a result of their acquittal on a similar conspiracy count in the Florida matter in 1987 be GRANTED. The substantive charges pending against defendant Jones in Counts 25, 26, 27 are separate offenses, and each requires proof of a fact not required for the other. Lovett is named only in Count One. Under the application of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), conspiracy to commit a crime and the crime itself are separate offenses for which the double jeopardy prohibition would not be applicable. *United States v. Nichols*, 741 F.2d at 773. Accordingly, I find and recommend that Count One of the indictment in this matter be DISMISSED as to defendants William Jones and Joseph Lovett on the basis of double jeopardy.

SO REPORTED AND RECOMMENDED at Augusta, Georgia this 30th day of April, 1990.

/s/ John W. Dunsmore, Jr.
JOHN W. DUNSMORE, JR.
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

UNITED STATES OF AMERICA	)	
	)	CR189-31
v.	)	
	)	(Filed
WILLIAM JONES, et al.,	)	May 29, 1990)
	)	
Defendants.	)	
	)	
	)	

ORDER

In an indictment handed down by the Grand Jury in the Southern District of Georgia on September 12, 1989 ("the Georgia indictment"), defendants William Jones and Joseph Lovett are charged with conspiracy to possess cocaine, marijuana, and heroin with intent to distribute in violation of 21 U.S.C. § 846. Both defendants have moved to dismiss the conspiracy count, alleging that they were tried and acquitted previously for the same offense. Magistrate Dunsmore held a hearing on this motion on January 8, 1990 and entered a Report and Recommendation on April 30. The magistrate found that the defendants were placed in double jeopardy by the conspiracy count in the Georgia indictment and recommended dismissing this count against them. The government has vigorously objected to the finding of the magistrate and asks this Court to reject his recommendation and deny the defendants' motion to dismiss.

BACKGROUND

Jones and Lovett, along with four other persons, were indicted in the United States District Court for the Southern District of Florida in 1987 ("the Florida indictment"). The Florida indictment charged the named parties with conspiring to possess with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 846, from "an unknown date until February 9, 1987" in the Southern District of Florida. The defendants were tried before the Honorable Sidney M. Aronovitz in the United States District Court for the Southern District of Florida from May 18 to May 29, 1987, and the jury found Jones and Lovett not guilty on the conspiracy charge.

In September 1990, Jones and Lovett were again indicted for participating in a narcotics conspiracy, but the second indictment was handed down in the Southern District of Georgia. The Georgia indictment charges the defendants and 30 other persons with conspiring to possess cocaine, marijuana, and heroin with intent to distribute. The conspiracy allegedly commenced on or about April 3, 1979, continued until the return of the indictment in September 1989, and occurred throughout the State of Georgia and in Florida, South Carolina, North Carolina, and Tennessee. Like the Florida indictment, the Georgia indictment charges the defendants with a violation of 21 U.S.C. § 846.

The defendants contend that the conspiracy count in the Georgia indictment is barred by the double jeopardy

prohibition of the Fifth Amendment.[1] Emphasizing that the two indictments overlap in time, geography, personnel, and statutory offense, the defendants argue that the actions alleged in the Florida indictment are part of the overarching conspiracy described in the Georgia indictment. The government, on the other hand, claims that the two indictments charge separate conspiracies. Admitting that the two conspiracies overlap in time and location, the government nevertheless contends that the Florida conspiracy involved an isolated incident with participants different than those charged in the Georgia indictment.

In a lengthy Report and Recommendation, the magistrate found that the two indictments charge a single conspiracy. Stressing that, under the law, participants in a conspiracy need not know all other co-conspirators or be involved in the conspiracy for its duration, the magistrate determined that the conspiracy charged in the Florida indictment was actually a component of the broad conspiracy alleged in the Georgia indictment. In making this determination, the magistrate applied the analysis set forth in *United States v. Marable*, 578 F.2d 151 (5th Cir. 1978), and apparently relied upon the two indictments and investigatory reports of the DEA and FBI. Noting that the government consistently includes conspiracy

---

[1] This amendment provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

counts in drug indictments, the magistrate commented on the need for careful drafting to avoid double jeopardy problems.

DOUBLE JEOPARDY

The double jeopardy clause of the Fifth Amendment prohibits a subsequent prosecution for an offense after a conviction or acquittal on that same offense. *Illinois v. Vitale*, 447 U.S. 410, 415 (1980); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). To support a claim of double jeopardy, the defendant must show that the second offense is, in law and in fact, the same as the first. *Marable*, 578 F.2d at 153. When the defendant is charged with conspiracy, the court must make a detailed inquiry into the record to determine whether the two indictments allege distinct agreements. Reliance on the indictments alone is not sufficient. *Id.*

The burden is on the defendant to raise the issue and make a prima facie showing of a nonfrivolous double jeopardy claim. *United States v. Stricklin*, 591 F.2d 1112, 1117 (5th Cir. 1979). Once the defendant has made such a showing, the burden shifts to the government to establish, by a preponderance of the evidence, that the indictments charge separate conspiracies. *Id.* at 1118.

ANALYSIS

As the magistrate correctly noted, in determining whether two indictments allege the same conspiracy, the Court must apply the analysis outlined in *Marable*. In *Marable*, the court focused on the following factors: 1) the

time frame of each conspiracy, 2) the persons acting as co-conspirators, 3) the statutory offenses charged in the indictments, 4) the overt acts charged or any other description of the offense which indicates the nature and scope of the activity which the government sought to punish in each case, and 5) the locations where the events took place. 578 F.2d at 154. The central question in the instant case is whether the particular transaction alleged in the Florida indictment was within the larger conspiracy charged in the Georgia indictment. *See United States v. Futch*, 637 F.2d 386, 389 (5th Cir. Unit B 1981), quoting *United States v. Ruigomez*, 576 F.2d 1149, 1151 (5th Cir. 1978).

The magistrate found, after applying the *Marable* factors, that the two indictments allege a single conspiracy. The Court's analysis leads to a different conclusion.

A. The *Marable* Analysis

1) Time – The Florida indictment alleges that the conspiracy commenced at a "date unknown" and continued until February 9, 1987. The conspiracy charged in the Georgia indictment covers a ten-year period beginning on April 3, 1979 and continuing until the date of the indictment, September 12, 1989. Thus, the time frames of the two indictments overlap.

2) Persons acting as co-conspirators – Six persons were charged as conspirators in the Florida indictment, including Jones and Lovett. The Georgia indictment charges 32 persons with conspiracy. With the exception of Jones and Lovett, however, none of those charged in the earlier indictment were included in the later one.

The magistrate found "significant overlapping" in the personnel of the two indictments and concluded that this factor supported a finding of a single conspiracy. First, he noted that Cuban-born persons were involved in the activities alleged in both indictments. Government documents relating to the Georgia case indicate that Anthony Kelly, a participant in the Georgia conspiracy, obtained narcotics from "unknown Cubans" in the South Florida area. In the Florida case, Jones and Lovett's alleged co-conspirators were Cuban. From this information, the magistrate concluded that the Cuban-born persons indicted in Florida constituted Anthony Kelly's "Cuban connection."

The government disputes that the same persons of Cuban descent were involved in both conspiracies. Evidence submitted by the government establishes that Anthony Kelly's Cuban supplier was Abel Coll-Dominiguez rather than Lazaro Lopez, Pedro Garcia, and Jamie Cruz, the Cubans charged in the Florida indictment.[2] Additionally, none of the investigatory reports or other evidence suggest that the Cuban-born individuals indicted in Florida were involved in any of the activities alleged in the Georgia indictment.

The magistrate also noted that both indictments refer to unknown co-conspirators. He stated that those designated as unknown in the Georgia indictment could include the individuals tried in Florida and thus found an overlap between the participants in the conspiracies

---

[2] Other Cuban-born persons purportedly involved in the Georgia conspiracy were Eleiser Quesada and Zardo LaHara.

charged in the two indictments. While the possibility of such overlap exists, it is insufficient to support a finding of a single conspiracy.

Where a single conspiracy has been found under *Marable*, the list of persons charged in the indictments at issue generally overlaps to a greater extent than in the case at hand. In *United States v. Nichols*, 741 F.2d 767 (5th Cir. 1984), for example, the same four or five individuals were named in each of four different indictments. Although those listed in some of the indictments varied somewhat, the individuals charged in all of the indictments were substantially the same, and this factor supported the court's determination that the indictments alleged a single conspiracy.

In contrast, in *United States v. Futch*, 637 F.2d 386 (5th Cir. Unit B 1981), only two named individuals out of 21 were common to both indictments. Similarly, in *United States v. Ruggiero*, 754 F.2d 927 (11th Cir. 1985), the only persons charged in both indictments were the two appellants. Based on this factor and others, the court in these cases found that the indictments alleged separate conspiracies.

The instant case is analogous to *Futch* and *Rucciero* as the only alleged participants common to both indictments are Jones andLovett. Thus, the "cast of characters" in the Florida and Georgia indictments is predominantly different, and this factor supports a determination that the two indictments allege separate conspiracies.[3]

---

[3] Defendants cite *United States v. Benefield*, 874 F.2d 1503 (11th Cir. 1989), as precedent for the magistrate's determination that the inclusion of unknown co-conspirators in an

(Continued on following page)

3) Statutory offenses – Both indictments allege violations of 21 U.S.C. § 846.

4) Nature and scope of the conspiracies – In determining whether two separate conspiracies have been charged, the Court must consider the evidence relating to each charge, including any overt acts. *Marable*, 578 F.2d at 153. The Florida indictment did not allege overt acts, but the evidence presented at trial related only to the defendants' activities on two days in February 1987. The named conspirators were allegedly attempting to buy six kilograms of cocaine from an undercover police officer. The money that was to be used for the purchase was kept in a hidden panel in the back of a truck. The evidence suggested that Jones and Lovett were the potential purchasers, but there was no evidence as to the ultimate destination of the drugs or the involvement of anyone but those named in the indictment.[4]

The Georgia indictment alleges 81 overt acts, describing a broad conspiracy with participation by many members. Certain conspirators, including Jones and Lovett,

---

(Continued from previous page)

indictment supports finding an overlap in personnel. In *Benefield*, however, the court did not find that the participants in the two indictments overlapped because of the naming of unknown parties. Rather, the court remanded the case to the district court for an evidentiary hearing to determine whether the personnel in the two indictments was substantially the same.

[4] Two persons, other than those indicted, were arrested for the attempted purchase and mentioned at trial. There is no evidence that either of these individuals was involved in the conspiracy charged in the Georgia indictment.

allegedly acquired cocaine, marijuana, and heroin from South Florida and other locations to be distributed within South Georgia and elsewhere. Either Jones or Lovett is named in six overt acts; each of these acts commenced in 1988 or later.

As partial support for his determination that the Florida and Georgia indictments charge a single conspiracy, the magistrate stated that both alleged a similar pattern of activity. He refers to two facts; in both cases, the method of transportation was motor vehicles and South Florida was a source location for the drugs. The Court cannot agree, however, that these facts support a finding of a single conspiracy.

In *United States v. Nichols*, 741 F.2d 767, the court found a single conspiracy alleged in numerous indictments because the pattern of activity in each was nearly identical. The same group of individuals participated in the planning and piloting of flights which originated in the United States, proceeded to Colombia, stopped in Belize for refueling, and landed on a remote airstrip near Raceland, Louisiana, the same plane was used in two of the flights. The court held that the substantially similar pattern activity alleged in these indictments signified a single conspiracy.

In contrast, the indictments and evidence in the cases at hand reveal only general similarities. Motor vehicles are commonly used by drug purchasers and distributors as a means of transportation for narcotics and currency. Similarly, South Florida is a well-known source location for narcotics. It cannot be controverted that members of numerous unrelated drug conspiracies obtain narcotics in

the South Florida area every day and transport the drugs in motor vehicles. These similarities between the two charges do not establish that these conspirators were acting pursuant to a single agreement. *See also United States v. Futch*, 637 F.2d 386 (fact that, in both indictments, defendants were alleged to have participated in the import of similar quantities of marijuana into coastal counties in Georgia through that use of shrimpboats and ten-wheel trucks during the same period of time was insufficient to establish a single agreement).

5) Geographic location – The geographic locations of the two indictments overlap.

The Court concludes, after considering the factors set forth in *Marable*, that the Florida and Georgia indictments charge separate offenses.

B. The *Dunn* Analysis

The conclusion that two separate conspiracies were charged is supported by the holding of *United States v. Dunn*, 775 F.2d 604, 607 (5th Cir. 1985); *accord United States v. Benefield*, 874 F.2d 1503, 1507 n. 5 (11th Cir. 1989). In that case, the defendant had previously been indicted for his participation, from July 23 to November 8, 1980, in a conspiracy to manufacture phenylacetone and amphetamine. After his conviction on that charge, he was again indicted and convicted for conspiracy to manufacture narcotics. The second indictment alleged that he was a co-conspirator from November 14, 1980 until June 3, 1982. The defendant contended that both convictions were the result of his uninterrupted association with a single conspiracy and claimed that the second conviction was

barred by the prohibition against double jeopardy. The court disagreed, holding that a person's "further [participation in an] 'old' conspiracy after being charged with that crime becomes a new offense for purposes of a double jeopardy claim." *Id.* at 607, quoting *United States v, Stricklin*, 591 F.2d 1112, 1121 n. 2 (5th Cir. 1979).

The defendants argue that *Dunn* is inapplicable to their case because there is evidence to suggest that they were involved with those named in the Georgia indictment before their arrest in Florida. They contend that their participation in the Georgia conspiracy was uninterrupted from their initial involvement *before* their arrest in Florida until the Georgia indictment was handed down, and that this prior involvement distinguishes their situation from that presented in *Dunn*. This argument is unpersuasive. The *Dunn* court specifically held that a defendant's arrest, for purposes of double jeopardy law, constitutes a termination of his agreement to participate in the conspiracy. His further participation after his arrest requires a new agreement on his part, even if the conspiracy has been ongoing in the interim. Thus, even assuming that the defendants were involved in the Georgia conspiracy before their Florida arrest, and that the Florida and Georgia indictments allege a single conspiracy, their later participation in that conspiracy constitutes a new offense for purposes of double jeopardy law.

Any other result is contrary to sound logic. Without such a rule, a defendant would be immunized indefinitely for his further participation in a conspiracy after his previous arrest and trial for that offense.

CONCLUSION

The Court agrees with the magistrate that the government tends to avail itself fully of the expansive language in the conspiracy statute and often draws indictments with a broad stroke. This practice may lead to cases being dismissed by the courts on double jeopardy grounds. In the case at hand, however, the government has carried its burden of proving by a preponderance of the evidence that the Florida and Georgia indictments charge separate conspiracies.[5] The defendants' double jeopardy rights will not be violated by a trial on the charge alleged in the Georgia indictment.

Accordingly, the Court does not accept the recommendation of the magistrate and denies the defendants' motion to dismiss the conspiracy charge against them.

SO ORDERED, this 30th day of May, 1990.

/s/ B. Avant Edenfield
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF GEORGIA

---

[5] Given the overlap in time, location, and statutory offense, the Court finds that the defendants established a prima facie nonfrivolous double jeopardy claim. Thus, the burden shifted to the government to prove separate offenses.

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

NO. 90-8518

D. C. Docket No. CR189-031

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH LOVETT, WILLIAM JONES,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Georgia

(August 13, 1991)

Before FAY and COX, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The judgment is affirmed for the reasons stated in the Order of the district court dated May 30, 1990 denying the appellants' motion to dismiss.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8518

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

JOSEPH LOVETT, WILLIAM JONES,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Georgia

---

ON PETITION(S) FOR REHEARING

(September 23, 1991)

BEFORE: FAY and COX, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellants, Lovett and Jones, is denied:

ENTERED FOR THE COURT:

/s/ Peter T. Fay
United States Circuit Judge

Supreme Court, U.S.
FILED
FEB 26 1992
OFFICE OF THE CLERK

No. 91-1036

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM JONES and JOSEPH LOVETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the acquittal of petitioners in the Southern District of Florida for their participation in a drug conspiracy bars their prosecution in the Southern District of Georgia on the drug conspiracy charges in this case, where their participation in the conspiracy in this case is alleged to have continued past the date of their indictment in the prior case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Ashe v. *Swenson*, 397 U.S. 436 (1970)	6
Garrett v. *United States*, 471 U.S. 773 (1985)	5
Grady v. *Corbin*, 495 U.S. 508 (1990)	6, 7
United States v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending, No. 90-1527	6
United States v. *Felix*, 926 F.2d 1522 (10th Cir. 1991), cert. granted, No. 90-1599 (Oct. 7, 1991)	7
United States v. *Gambino*, 920 F.2d 1108 (2d Cir. 1990), cert. denied, 112 S. Ct. 54 (1991), and petition for cert. pending, No. 91-31	7
United States v. *Garcia*, 854 F.2d 1280 (11th Cir. 1988), cert. denied, 489 U.S. 1031 (1989)	3
United States v. *Langella*, 804 F.2d 185 (2d Cir. 1986)	4-5
United States v. *MacDougall*, 790 F.2d 1135 (4th Cir. 1986)	5
United States v. *Marable*, 578 F.2d 151 (5th Cir. 1978)	3, 5
United States v. *Pungitore*, 910 F.2d 1084 (3d Cir. 1990), cert. denied, 111 S. Ct. 2010 (1991)	7
United States v. *Ruggiero*, 754 F.2d 927 (11th Cir.), cert. denied, 471 U.S. 1127 (1985)	4
United States v. *Scarpa*, 913 F.2d 993 (2d Cir.), cert. denied, 111 S. Ct. 57 (1990)	7

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause)	2, 3, 4, 7
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1036

WILLIAM JONES and JOSEPH LOVETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 31a) is unpublished, but the decision is noted at 943 F.2d 1318 (Table). The opinions of the district court (Pet. App. 19a-30a) and of the magistrate (Pet. App. 1a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1991, and a petition for rehearing was denied on September 23, 1991. Pet. App. 32a. The petition for a writ of certiorari was filed on December 23, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 12, 1989, petitioners and a number of co-defendants were charged in the United States District Court for the Southern District of Georgia with various violations of federal drug laws. Count 1, the only count at issue here, named both petitioners as members of a drug conspiracy that operated from 1979 through the date of the indictment, in violation of 21 U.S.C. 846.[1] Petitioners moved to dismiss the conspiracy charge, claiming that it was barred on double jeopardy grounds as a result of their 1987 prosecution on drug conspiracy charges in the Southern District of Florida. The district court denied the motion and the court of appeals affirmed.

1. The indictment in this case alleged that, from 1979 through 1989, petitioners participated with 30 co-defendants in a broad conspiracy to distribute cocaine, marijuana, and heroin. The conspirators were alleged to have acquired the drugs in South Florida and other places and to have distributed them in South Georgia and elsewhere. Petitioners were named in six of the 81 overt acts listed in the indictment; each of those overt acts took place in 1988 or later. Pet. App. 26a-27a; Pet. App. 2a.

2. In February 1987, both petitioners were charged, along with four co-defendants, in a two-count indictment filed in the Southern District of Florida. Count 1 charged petitioners with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Pet. App. 2a. Count 2 charged petitioners with attempted distribution of

---

[1] Petitioner Jones was also charged in three additional counts with distributing large quantities of cocaine and/or marijuana on specific dates in 1988 and 1989, in violation of 21 U.S.C. 841(a)(1).

cocaine, also in violation of 21 U.S.C. 846. All of the evidence at trial related to petitioners' activities during two days in February 1987, when they attempted to buy six kilograms of cocaine from an undercover police officer. Pet. App. 26a. Both petitioners were acquitted of the conspiracy charge, but petitioner Lovett was found guilty of the attempted possession with intent to distribute charge. See *United States* v. *Garcia*, 854 F.2d 1280, 1281 (11th Cir. 1988) (opinion affirming convictions of petitioner Lovett and three of his Florida co-defendants), cert. denied, 489 U.S. 1031 (1989).

3. Petitioners' motion to dismiss the instant conspiracy count on double jeopardy grounds was referred to a magistrate, who recommended that the motion be granted. Pet. App. 1a-18a. The district court rejected that recommendation, applying the five-factor analysis of *United States* v. *Marable*, 578 F.2d 151, 154 (5th Cir. 1978), for determining whether two conspiracies constitute "the same offense" for double jeopardy purposes. The court found that (1) "the time frames of the two [conspiracy] indictments overlap," Pet. App. 23a; (2) with the exception of petitioners, none of the six co-conspirators named in the Florida case were among the 32 co-conspirators named in the indictment in this case, Pet. App. 23a-25a; (3) the statutory offenses charged in the two indictments were identical, Pet. App. 26a; (4) the "indictments and evidence in the [two] cases at hand reveal only general similarities," especially in light of the broad-ranging nature of the indictment in this case and the fact that the evidence at the Florida trial was limited to events that occurred on two days in February 1987, Pet. App. 26a-28a; and (5) the "geographic locations of

the two indictments overlap," Pet. App. 28a. After considering all of those factors, the court concluded "that the Florida and Georgia indictments charge separate offenses." *Ibid.*

In an alternative holding, the district court ruled that "even assuming that the [petitioners] were involved in the Georgia conspiracy before their Florida arrest, and that the Florida and Georgia indictments allege a single conspiracy, their later participation in that conspiracy constitutes a new offense for purposes of double jeopardy law." Pet. App. 29a. Any other result, explained the court, would be "contrary to sound logic" because "a defendant would be immunized indefinitely for his further participation in a conspiracy after his previous arrest and trial for that offense." *Ibid.*

The court of appeals affirmed in an unpublished order adopting the reasoning of the district court. Pet. App. 31a.

ARGUMENT

Petitioners renew their contention that their prosecution on the Florida conspiracy charge should bar their prosecution on the conspiracy count in the Georgia indictment, notwithstanding the fact that they are alleged to have participated in the Georgia conspiracy after the date of their indictment in Florida.

1. The district court correctly found that the two indictments charged distinct conspiracies under the totality of the circumstances test traditionally employed by the courts to determine whether two conspiracies are the same for double jeopardy purposes. See, *e.g.*, *United States* v. *Ruggiero*, 754 F.2d 927, 932 (11th Cir.), cert. denied, 471 U.S. 1127 (1985); *United States* v. *Langella*, 804 F.2d 185, 189 (2d

Cir. 1986); *United States* v. *MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *United States* v. *Marable*, 578 F.2d 151, 154 (5th Cir. 1978). Aside from petitioners, there was no overlap in personnel between the two conspiracies. Although both conspiracies involved transportation of drugs by motor vehicle and purchase of drugs in South Florida, the district court correctly observed that "numerous unrelated drug conspiracies obtain narcotics in the South Florida area every day and transport the drugs in motor vehicles." Pet. App. 27a-28a. Moreover, there was no evidence that the drugs whose purchase was at issue in the Florida case were destined for sale through the South Georgia network involved in the instant case. See Pet. App. 26a. In any event, the district court's factual determination that the two conspiracies were distinct does not warrant further review.

2. Quite apart from the fact that the two conspiracies were distinct, petitioners' successive prosecutions were permissible because the Georgia conspiracy continued for two years past the date of the earlier indictment and all the overt acts charged against petitioners postdated that indictment. This Court held in *Garrett* v. *United States*, 471 U.S. 773, 791-792 (1985), that a defendant may be prosecuted successively for two offenses where the second-charged offense was not committed until after the earlier indictment, because the earlier indictment could not have put him in jeopardy for that offense. See *id.* at 797-798 (O'Connor, J., concurring). If the rule were to the contrary, a member of a conspiracy who has once been prosecuted for conspiring to commit certain offenses would obtain a lifetime grant of immunity from future prosecution for conspiring to commit the same offenses at a later date,

even if he continued indefinitely to promote the commission of those criminal acts through his membership in the conspiracy.[2]

3. In support of their claim, petitioners rely on *Grady* v. *Corbin*, 495 U.S. 508 (1990), in which the Court held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 521. *Grady*, however, does not help petitioners' cause.

First, as both courts below concluded, the two conspiracies in this case did not charge the same conduct, but rather involved separate agreements among distinct groups of individuals to achieve different objectives. Contrary to petitioners' contention (Pet. 10-13), *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending, No. 90-1527, does not provide support for any contrary conclusion. In *Calderone*, the Second Circuit held that the "conduct" at issue in a conspiracy prosecution, for purposes of analysis under *Grady*, is not the act of entering into the charged agreement, but rather the conduct from which the government seeks to have the jury infer the agreement. 917 F.2d at 721. Although we disagree with the Second Circuit's holding on that point, petitioners do not assert that the government intends in this prosecution to prove any of the conduct from which the government

---

[2] Where, as here, the first prosecution results in an acquittal, the defendant would of course be protected in future prosecutions under the doctrine of collateral estoppel of *Ashe* v. *Swenson*, 397 U.S. 436 (1970). Petitioners do not cite *Ashe* and do not claim in their petition that the doctrine of collateral estoppel would bar the present prosecution.

sought to have the jury infer the conspiratorial agreement in the Florida prosecution. *Calderone*, accordingly, is of no assistance to petitioners.

Second, *Grady* did not renounce the rule allowing successive prosecutions where, as here, the offense charged in the later case had not been completed at the time of the indictment in the earlier case. See *United States* v. *Gambino*, 920 F.2d 1108, 1112-1113 (2d Cir. 1990), cert. denied, 112 S. Ct. 54 (1991), and petition for cert. pending, No. 91-31; *United States* v. *Scarpa*, 913 F.2d 993, 1013-1014 n.8 (2d Cir.), cert. denied, 111 S. Ct. 57 (1990); *United States* v. *Pungitore*, 910 F.2d 1084, 1111, 1115 & n.37 (3d Cir. 1990), cert. denied, 111 S. Ct. 2010 (1991). As noted above, that rule was established quite clearly in *Garrett*—a case cited in *Grady* with apparent approval, see 495 U.S. at 522—and the *Grady* Court itself expressly reaffirmed that the Double Jeopardy Clause does not bar a subsequent prosecution where "the State is unable to proceed on the more serious [latter] charge at the outset because the additional facts necessary to sustain that charge have not occurred." 495 U.S. at 516 n.7.[3]

---

[3] Neither *Calderone* nor *United States* v. *Felix*, No. 90-1599, also cited by petitioners (Pet. 13-15), involved defendants who were prosecuted in a successive prosecution for criminal activity that continued past the date of their earlier indictment. Accordingly, the result in this case is unlikely to be affected by this Court's disposition of *Calderone* or *Felix*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

FEBRUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45338